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Follow-up requests to 5/17/2006 OIG Interview of FBI AGC [REDACTED]

1. Effective dates of the two attachments to ECPA National Security Letters which list types of information that may be considered by a recipient to be "toll billing records." The attachments were marked as Exhibits 2 (shorter version) & 3 (longer version).
2. Effective dates of the two attachments to ECPA National Security Letters which list types of information that may be considered by a recipient to be an "electronic communication transactional record." The attachments were marked as Exhibits 4 (shorter version) & 5 (longer version).
3. Your emails and OGC guidance on how to handle "over collections" from any type of NSL.
4. Your emails to "all CDCs" during the period from 1/1/2003 to date in response to questions from the field regarding NSL issues or that you initiated to address ad hoc questions.
5. Hard copies of the current model ECs and NSLs (as of March 9, 2006) and the guidance (as of March 15, 2006) posted on the FBI/OGC's Intranet. A printout from the FBI's Intranet was marked as Exhibit 6. (This request may already be in process.)
6. Documents in your hard copy or electronic files relating to the CAU/ NSL issue we discussed, including emails; letters sent by CAU to telephone carriers requesting information to be followed by an NSL; documents referencing meetings with CAU and others concerning this issue; and the forms and attachments reflecting the resolution of the discussions with CAU, including the follow-up information you referenced.
7. The name and contact information of the Federal Reserve attorney with whom you communicated on the TFOS/ NSL issue we discussed.
8. The name of the Section Chief at TFOS at the time of the TFOS / NSL issue.
9. Emails you sent, received, or were copied on regarding the TFOS/ NSL issue.
10. The FBI's current request for any legislative changes to the NSL statutes, including the suggested revisions we discussed to EPCA and the "Buckley" law.

Random sampling
of
NSL powerpoints
that I used
in training
over 2004-2005

We would be grateful if you would provide these documents to us with copies to the Inspection Division c/o Section Chief David Evans, Audit, Evaluation and Analysis Section by May 23, 2006.

[redacted] (OGC) (FBI)

(1 attachment)

From: [redacted] (Div09) (FBI)

Sent: Friday, April 16, 2004 12:20 PM

To: [redacted] (FBI)

Subject: Here is a copy of my powerpoint

06/05/06

SENSITIVE BUT UNCLASSIFIED
NON-RECORD



SENSITIVE BUT UNCLASSIFIED

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-13-2007 BY 65179 DMH/TAM/KSE/JE

NSL VIO-2700

6/5/2006

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Investigative Tools for Intelligence Investigations

National Security Law Branch
Federal Bureau of Investigation

National Security Letters

- **NSLs** – administrative subpoenas that allow the FBI to obtain three types of information:
 - phone and email communication records from telephone companies and internet service providers (Electronic Comm. Privacy Act) (18 USC 2709) (same information as gathered in pen register/TT except historic, not live)
 - financial institution records (Right to Financial Privacy Act) (12 USC 3414(a)(5)(A))
 - credit bureau info – identity of financial institutions where consumer maintains or maintains an account; and consumer identifying information (includes names associated with person, current/former addresses and places of employment) (Fair Credit Reporting Act) (15 USC 1681u (a), (b))

National Security Letters

- Prior to Patriot Act, standard for getting NSL was that the target be tied to foreign power.
- Under Section 505 of the Patriot Act, lesser standard – only need the information to be “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment of the Constitution of the United States.”
- Prior to October 31, 2003, could only get NSL in PI; now can get it in FI or full investigation
- Subject of NLS does not need to be target of investigation, as long as expected information is relevant to authorized investigation

National Security Letters

- Prior to Patriot Act, approval authority could be no lower than Deputy Assistant Director; Patriot Act allowed delegation down to the SACs.
- Currently, approval authority has been delegated to
 - Deputy Director
 - Assistant Directors in charge, and all DADs for CI/CT
 - General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs
 - Assistant Director in Charge, and all SACs in NY, D.C., and LA
 - All SACs in other field divisions
- Acting SAC cannot sign NSLs
- If do not have SAC in field office, can send EC to NSLB requesting that we draft the NSL and send it out

National Security Letters

- For all NSLs, issuing office must prepare two documents: (1) the NSL itself; and (2) an EC approving the NSL and documenting the prediction
- All NSLs must be addressed to the specific company point of contact (many of which are listed on NSLB's website)
- All NSLs should identify the statutory authority for the request, the type of records requested, and provide identifying information to assist the company in processing the request.
- All NSLs require a certification that the records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities and that an investigation of a USP is not conducted solely on the basis of first amendment rights.

National Security Letters

- All NSLs should have a non-disclosure warning
- All NSLs should say that the information should be personally delivered to the FBI, not mailed
- All NSLs must be personally served on or secure faxed to the company (even though they are not classified, the fact of a named target and a reference to an IT or intelligence investigation would imply that the target is the subject of an National Security investigation, which fact is classified)

National Security Letters

- Certain NSLs have an attachment suggesting the type of information that the company may be considered to fall within the parameters of the statute. For example:

Toll billing records

Financial records

National Security Letters

- The cover EC serves four functions:

- It documents the predication for the NSL by stating why the information sought is relevant to an investigation
- It documents the approval of the NSL by field supervisors
- It contains information needed to fulfill Congressional reporting requirements for each type of NSL
- It transmits the NSL to the requesting squad or delivering field division for delivery

- For reporting purposes, the EC must include case file number, subjects USP status, type of NSL issued, and the number of phone numbers, email addresses, account numbers or individual records being requested in the NSL

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RFPA National Security Letters

- Recent change in the statute greatly expands the definition of "financial institutions" upon which we can serve NSLs under the RFPA
- Per 31 USC 5312(a)(2), the list includes: insured bank; commercial bank or trust company; private banker; credit union; thrift institution; broker or dealer registered with the SEC; investment banker or investment company; currency exchange; issuer, redeemer or cashier of travelers' checks, checks, money orders; operator of a credit card system; insurance company; pawnbroker; loan or finance company; travel agency; licensed sender of money; telegraph company; persons involved in real estate closings and settlements; US Postal Service; agency of US/state/local gov't carrying out any of foregoing; casino; any business similar to the above list; any business whose cash transactions have high degree of usefulness in criminal, tax or regulatory matters

Full Credit Reports – Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information); under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte Court order
- Section 505 of Patriot Act changed standard for FCRA Court order for consumer report – eliminated requirement that target is tied to foreign power (same change as with respect to NSLs) and created standard of relevance to an authorized investigation to protect against int'l terrorism or clandestine intelligence activities provided that an investigation of a USP is not conducted solely on the basis of first amendment rights.

Full Credit Report NSL - IT cases

- Patriot Act added 1681v to FCRA to authorize NSLs to obtain full "consumer report of a consumer and all other information in a consumer's file" (not just identity of financial institution or consumer identifying information) in IT cases only
- Full credit report to be provided to "a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct of such investigation, activity or analysis."

Full Credit Report NSL - IT cases

- Same basic approval authority as other NSLs (Deputy Director, EAD for CT/ CI; AD and all DADs for CT, General Counsel, Deputy General Counsel for National Security Affairs, Senior Counsel for National Security Affairs, ADICs and SACs in NY, D.C., LA, and all SACs in other field offices)
- Includes non-disclosure provision
- Consumer reports in non-IT cases still require court order

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Full Credit Report NSL - IT cases

- As with other NSLs, subject of NSL does not have to be target of the investigation
- Same mechanism as other NSLs – Cover EC and NSL itself
- Although no congressional reporting requirement – cover EC should still state the number of reports requested, in the event we are asked by Congress about the use of this NSL

Dissemination of NSL Information

- Information obtained through the use of NSLs may be disseminated in accordance with general standards set forth in AG guidelines – i.e., the rules that apply to information sharing with DOJ, federal, state and local authorities wherein share if information relates to the responsibility of the entity

Dissemination of NSL Information

- Per the AG guidelines, NSL information dissemination is also subject to specific statutory limitations (e.g. toll record NSL statute, ECPA, 18 USC 2701, and financial record NSL statute, RFP, 12 USC 3414, permit dissemination if per AG guidelines and information is clearly relevant to responsibilities of recipient agency; credit report 1681u NSL statute, FCRA, 15 USC 1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of a FCI investigation; no special statutory rules for dissemination of 15 1681v information)

Payment for NSL Information

- NSL for toll records/email accounts, ECPA, does not provide for reimbursement of costs, although some offices do pay when requested in order to keep on good terms with service providers
- NSL for financial records, RFP, requires reimbursement of costs; Title 12, CFR Part 219, and appendix, provides reimbursement cost schedule
- NSL for financial institution information and consumer identifying information, FCRA, section 1681u, provides for payment but no schedule has been promulgated
- NSL for full credit reports, FCRA, section 1681v does not provide for reimbursement of costs

FISA - Business Records

- Under FISA, 50 USC 1861, FBI can apply to FISC for an ex parte order for business records (note: other sections of FISA say that AG applies to Court for order)
- When added to FISA in 1998, limited to business records from common carriers, public accommodations, vehicle rentals, storage facilities and standard was specific and articulable facts that records related to agent of foreign power

FISA - Business Records

- Patriot Act expanded universe of items obtainable, to "any tangible things (including books, records, papers, documents and other items)"
- Patriot Act changed legal standard: "the information to be obtained is foreign intelligence information not concerning a US person, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence gathering activities" and investigation of USP cannot be based solely on activities protected by First Amendment
- Same standard as established by Patriot Act for PR/TT; NSLs

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FISA - Business Records

- FISA permits delegation down to level of ASAC
- At current time, approval authority has been delegated to headquarters officials (Deputy Director, EAD for CT/CI, AD and all DADs of CT, CI, Cyber, General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs)
- Business records form available for field to fill out and submit to headquarters and NSLB (atty [redacted])

FISA - Business Records

- Provision used once, before Patriot Act
- Since Patriot Act, requests have been made to OIPR but OIPR hasn't presented any to the FISC
- Signed request that was approved by FBI and OIPR is now with the DAG's office
- Thus, this provision of the Patriot Act has never been used

FISA - Business Records

- May or may not be able to get records covered by other statutes, such as tax returns or educational records - OIPR takes position that specific tax and educational records statutes govern the procurement of those records
- Library record requests will be subject to scrutiny

Educational Records

- Section 507 of the Patriot Act amended the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC 1232g (aka the "Buckley amendment"), to provide for the AG to submit written application to court of competent jurisdiction (OIPR says this does not include FISC) for ex parte order requiring educational institution to provide educational records "relevant to an authorized investigation or prosecution of [certain defined federal terrorism offenses] or an act of domestic or international terrorism"
- Must provide certification that there are specific and articulable facts giving reason to believe that the education records are likely to contain information relevant to such an investigation

Educational Records

- Education records defined in FERPA as "those records, files, documents and other materials which (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."
- Educational institution is immune from liability if it complies with court order
- Institutions are not supposed to tell target of the request, since court order is ex parte, but no particular provision of statute provides for secrecy of the AG application - would need to include such provision in the court order
- General record keeping requirements of the school do not apply to the ex parte order
- Procedures for submitting a request for such an application to the AG have not been promulgated

Educational Records

- Patriot Act's amendment to Buckley was an expansion of the availability of student records, which are generally protected under 20 USC 1232g, which specifically sets forth who may be granted access to such records.
- Until this change in the Patriot Act, records were only available (and remain available) with the written consent of the student, a court order, or a GJ or law enforcement subpoena (if by court order or subpoena, student must be notified in advance of compliance unless a court orders non-disclosure)

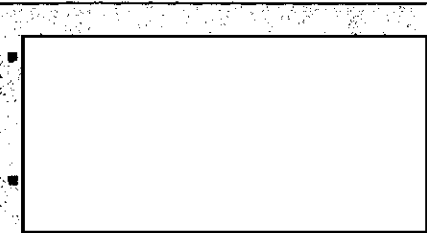
Educational Records

- Statute permits a school (but doesn't require it) to release "directory information" (name, address, telephone, DOB, field of study, dates of attendance, degrees and awards received, participation in official activities and sports, etc.) without student consent or court order
- Statute requires that students be afforded an opportunity to forbid release of directory information without their prior consent or court order
- Schools unlikely to release directory information, even though permitted, without notifying students

Educational Records

- Statute applies to student academic records so does not protect records kept by campus law enforcement or records maintained by medical professionals affiliated with the school; nor does it protect records of employees
- FBI policy, as stated from 1976 and 1996, is not to request or accept or use information from sources or other employees at educational institutions obtained from student records

Educational Records



Tax Records

- LIMITATIONS ON TAXPAYER RETURN INFORMATION:
 - Tax administration case: 26 USC 6103(i)(1)(2) - IRS employees can get access to tax records without a court order, and the information can be disseminated to DOJ/FBI employees personally and directly engaged in the proceeding, without a court order, upon request from the AG, DAG or Asst AG to the Treasury Secretary
 - Thus, even if JTTF IRS member has access to tax records for tax administration purposes, he cannot share it with other members of JTTF unless for tax administration purposes.
 - Non-tax criminal case: 26 USC 6103(i)(1)(A), (B) - federal employees (including IRS and DOJ) personally and directly engaged in the proceeding can get access to taxpayer return information via an ex parte court order
 - thus, if there is a criminal nexus in your case, and you need taxpayer return information, you can obtain it through an ex parte court order

Tax Records – Taxpayer Return Information

- Intelligence case: 26 USC 6103(i)(7)(C) – provided for AG application to a federal district court for an ex parte court order to disclose taxpayer return information to federal intelligence or LE agency employees personally and directly engaged in any investigation, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity.
- However, provision expired December 31, 2003 and was never used and never renewed
- Thus, at present time, no way to get taxpayer return information in intelligence case if no criminal nexus

Tax Records – Return Info Other Than Taxpayer Return

- LIMITATIONS ON RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION – term defined as information gathered during course of tax investigation that did not come from taxpayer
- Non-tax criminal case: 26 USC 6301(i)(2)(A), (B) – federal employees personally and directly engaged in the proceeding can have access to return information (other than taxpayer return information) upon written request from head of agency

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Tax Records – Return Info Other Than Taxpayer Return

- Intelligence case: 26 USC 6103(i)(3)(C) provided that we could get (and did get) from the IRS (including the IRS rep on JTTF) return information (other than taxpayer return information) "that may be related to a terrorist incident, threat or activity" – IRS rep needed permission to disclose from an IRS disclosure officer, once permission received, information was disseminated to FBI, and IRS disclosure officer formally notified Director of the FBI of the disclosure
- However, that provision expired December 31, 2003 and has not been renewed

Tax Records – Return Info Other Than Taxpayer Return

- Never used provision – 26 USC 6103(i)(7)(A) provided for formal written request by FBI Director or his delegate to the IRS for disclosure of return information (other than taxpayer return information) to an employee personally and directly engaged in the response to or investigation of any terrorist incident, threat or activity
- Never used provision – 26 USC 6103(i)(7)(B) – provided for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information nor investigation concerning any terrorist incident, threat or activity
- These provisions were never used, expired December 31, 2003 and have not been renewed

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Tax Records – Return Info Other Than Taxpayer Return

- Thus, in intelligence cases, we cannot get return information other than taxpayer return information, nor can we get taxpayer return information, unless case has criminal nexus
- Per 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection or return information – thus, need to be careful when accepting any type of tax return information
- POC at IRS on disclosure matters and court orders – [redacted]

Tax Records – Use in Proceedings

- Per 26 USC 6103(i)(4) entitled "Use of certain disclosed returns and return information in judicial or administrative proceeding" – taxpayer return information and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party – FISA application does not seem to be encompassed here
- Per 26 USC 7213, there are felony criminal penalties that attach to unauthorized disclosure of return information
- Thus, it is recommended that regardless of how you received return information, it should not be included in a FISA application

[redacted] Information

- [redacted] – private company
- Has database [redacted]
- [redacted]
- POC is [redacted] Can fax a request [redacted] on FBI letterhead
- No legal process required if information is to stay within the FBI

National Security [redacted]

- Request to [redacted] reasonable grounds [redacted] necessary to protect national security
- Need Director/HQ designee approval
- 120 days
- Need [redacted]
- Need [redacted]
- [redacted] need [redacted]

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QUESTIONS?	
■ NSLB - (202) 324-	[redacted]
[redacted]	- (202) 324-
[redacted]	
■ Visit our FBI Intranet site at	
[redacted]	[redacted]

Investigative Tools for Intelligence Investigations

National Security Law Branch
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Full Credit Reports - Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information), under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte Court order
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- Patriot Act's amendment to Buckley was an expansion of the availability of student records, which are generally protected under 20 USC 1232g, which specifically sets forth who may be granted access to such records.
- Until this change in the Patriot Act, records were only available (and remain available) with the written consent of the student, a court order, or a GJ or law enforcement subpoena (if by court order or subpoena, student must be notified in advance of compliance unless a court orders non-disclosure)
- Thus, if have criminal nexus, can obtain such records through subpoena and can obtain court order to prevent school from notifying student of dissemination of the records

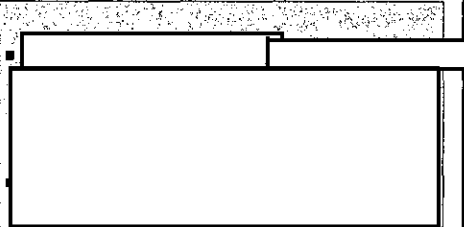
Educational Records

- Statute permits a school (but doesn't require it) to release "directory information" (name, address, telephone, DOB, field of study, dates of attendance, degrees and awards received, participation in official activities and sports, etc.) without student consent or court order
- Statute requires that students be afforded an opportunity to forbid release of directory information without their prior consent or court order
- Schools unlikely to release directory information, even though permitted, without notifying students

Educational Records

- Statute applies to student academic records so does not protect records kept by campus law enforcement or records maintained by medical professionals affiliated with the school; nor does it protect records of employees
- FBI policy, as stated from 1976 and 1996, is not to request or accept or use information from sources or other employees at educational institutions obtained from student records

Educational Records



Tax Records

- LIMITATIONS ON TAXPAYER RETURN INFORMATION:
 - Tax administration case: 26 USC 6103(h)(1), (2) - IRS employees can get access to tax records without a court order, and the information can be disseminated to DOJ/FBI employees personally and directly engaged in the proceeding, without a court order, upon request from the AG, DAG or Asst. AG to the Treasury Secretary
 - Thus, even if JTTF IRS member has access to tax records for tax administration purposes, he cannot share it with other members of JTTF unless for tax administration purposes.
 - Non-tax criminal case: 26 USC 6103(h)(1)(A), (B) - federal employees (including IRS and DOJ) personally and directly engaged in the proceeding can get access to taxpayer return information via an ex parte court order
 - thus, if there is a criminal nexus in your case, and you need taxpayer return information, you can obtain it through an ex parte court order

Tax Records – Taxpayer Return Information

- Intelligence case: 26 USC 6103(i)(7)(C) - provided for AG application to a federal district court for an ex parte court order to disclose taxpayer return information to federal intelligence or LE agency employees personally and directly engaged in any investigation, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity.
- However, provision expired December 31, 2003 and was never used and never renewed
- Thus, at present time, no way to get taxpayer return information in intelligence case if no criminal nexus

Tax Records – Return Info Other Than Taxpayer Return

- LIMITATIONS ON RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION - term defined as information gathered during course of tax investigation that did not come from taxpayer
- Non-tax criminal case: 26 USC 6301(i)(2)(A), (B) - federal employees personally and directly engaged in the proceeding can have access to return information (other than taxpayer return information) upon written request from head of agency

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Tax Records – Return Info Other Than Taxpayer Return

- Intelligence case: 26 USC 6103(i)(3)(C) provided that we could get (and did get) from the IRS (including the IRS rep on JTTF) return information (other than taxpayer return information) "that may be related to a terrorist incident, threat or activity" – IRS rep needed permission to disclose from an IRS disclosure officer, once permission received, information was disseminated to FBI, and IRS disclosure officer formally notified Director of the FBI of the disclosure
- However, that provision expired December 31, 2003 and has not been renewed

Tax Records – Return Info Other Than Taxpayer Return

- Never used provision – 26 USC 6103(i)(7)(A) provided for formal written request by FBI Director or his delegate to the IRS for disclosure of return information (other than taxpayer return information) to an employee personally and directly engaged in the response to or investigation of any terrorist incident, threat or activity
- Never used provision – 26 USC 6103(i)(7)(B) – provided for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information nor investigation concerning any terrorist incident, threat or activity.
- These provisions were never used, expired December 31, 2003 and have not been renewed

Tax Records – Return Info Other Than Taxpayer Return

- Thus, in intelligence cases, we cannot get return information other than taxpayer return information, nor can we get taxpayer return information, unless case has criminal nexus
- Per 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection or return information – thus, need to be careful when accepting any type of tax return information
- POC at IRS on disclosure matters and court orders – [redacted]

Tax Records – Use in Proceedings

- Per 26 USC 6103(j)(4) entitled "Use of certain disclosed returns and return information in judicial or administrative proceeding" – taxpayer return information and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party – FISA application does not seem to be encompassed here
- Per 26 USC 7213, there are felony criminal penalties that attach to unauthorized disclosure of return information
- Thus, it is recommended that regardless of how you received return information, it should not be included in a FISA application

Bank Secrecy Act Records

- Financial records that can be obtained from IRS:

[redacted]

Can call [redacted] at the IRS for this information [redacted]

[redacted] Information

- [redacted] private company [redacted]
- Has database [redacted]
- It provided [redacted]
- POC is [redacted] and [redacted]
- Can fax a request [redacted] on FBI letterhead [redacted]
- No legal process required if information is to stay within the FBI

National Security [redacted]

- Request [redacted]
- Need Director/HQ designee approval
- 120 days [redacted]
- Need [redacted]
- Need [redacted]
- [redacted] need [redacted]

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QUESTIONS?

- NSLB - (202) 324-[redacted]
- [redacted] (202) 324-[redacted]
- Visit our FBI Intranet site at
http://[redacted]

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Investigative Tools for Intelligence Investigations

National Security Law Branch
Federal Bureau of Investigation

National Security Letters

- **NSLs – administrative subpoenas that allow the FBI to obtain three types of information:**
 - phone and email communication records from telephone companies and internet service providers (Electronic Comm. Privacy Act) (18 USC 2709) (same information as gathered in pen register/IT except historic, not live)
 - financial institution records (Right to Financial Privacy Act) (12 USC 3414(a)(5)(A))
 - credit bureau info – identity of financial institutions where consumer maintains or maintained an account, and consumer identifying information (includes names associated with person, current/former addresses and places of employment) (Fair Credit Reporting Act) (15 USC 1681u (a), (b))

National Security Letters

- Prior to Patriot Act, standard for getting NSL was that the target be tied to foreign power.
- Under Section 505 of the Patriot Act, lesser standard – only need the information to be "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment of the Constitution of the United States."
- Prior to October 31, 2003, could only get NSL in full; now can get it in PI or full investigation.
- Subject of NSL does not need to be target of investigation, as long as expected information is relevant to authorized investigation.

National Security Letters

- Prior to Patriot Act, approval authority could be no lower than Deputy Assistant Director; Patriot Act allowed delegation down to the SACs.
- Currently, approval authority has been delegated to:
 - Deputy Director
 - Executive Assistant Director (EAD) for CTC/C
 - Assistant Directors in charge, and all DADs for C/CTC/Cyber
 - General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs
 - Assistant Director in Charge, and all SACs in NY, D.C., and LA
 - All SACs in other field divisions
- Acting SAC cannot sign NSLs
- If do not have SAC in field office, can send EC to NSLB requesting that we draft the NSL and send it out

National Security Letters

- For all NSLs, issuing office must prepare two documents: (1) the NSL itself; and (2) an EC approving the NSL and documenting the prediction
- All NSLs must be addressed to the specific company point of contact (many of which are listed on NSLB's website)
- All NSLs should identify the statutory authority for the request, the type of records requested, and provide identifying information to assist the company in processing the request.
- All NSLs require a certification that the records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities and that an investigation of a USP is not conducted solely on the basis of first amendment rights.

National Security Letters

- All NSLs should have a non-disclosure warning
- All NSLs should say that the information should be personally delivered to the FBI, not mailed
- All NSLs must be personally served on or secure faxed to the company (even though they are not classified, the fact of a named target and a reference to an IT or intelligence investigation would imply that the target is the subject of an National Security investigation, which fact is classified)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-12-2007 BY 65179 DMH/TAM/KSR/JB

NSL VIO-2715

National Security Letters

- Certain NSLs have an attachment suggesting the type of information that the company may considered to fall within the parameters of the statute. For example:

- Toll billing records

- Financial records

National Security Letters

- The cover EC serves four functions:

- It documents the predication for the NSL by stating why the information sought is relevant to an investigation
- It documents the approval of the NSL by field supervisors
- It contains information needed to fulfill Congressional reporting requirements for each type of NSL
- It transmits the NSL to the requesting squad or delivering field division for delivery

- For reporting purposes, the EC must include case file number, subjects USP status, type of NSL issued, and the number of phone numbers, email addresses, account numbers or individual records being requested in the NSL

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National Security Letters

- September 2004 NY SD federal court decision holding that NSL statutes are unconstitutional because they do not provide for a challenge by the recipient of the NSL to the NSL or to the non-disclosure provision; and because the non-disclosure provision is mandatory without any certification or explanation in a particular case.
- Court found a First Amendment violation in the mandatory nature of the non-disclosure provision; absence of procedure to challenge it; and absence of exception for disclosure to attorneys for legal advice; and to others in entity needed to assist in production (later provision is found in some but not all NSL statutes).
- There are now draft revisions in Congress to rectify the problems that the Court found – to provide for a challenge by the recipient to NSL itself; to provide for a certification by the FBI that the non-disclosure provision is necessary in this particular case; to provide for a challenge by the recipient of the NSL to that certification; and to provide for mechanism for government to enforce NSL.
- In meantime, there is a stay of the Court's decision and we can continue to issue NSLs.

ECPA NLS

- Wide variety of information that we may obtain under "toll billing records"
- Should contact ECAU in formulating NSL language – see their website as to the POC language: [http://\[redacted\].default.htm](http://[redacted].default.htm)

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RFP National Security Letters

- Recent change in the statute greatly expands the definition of "financial institutions" upon which we can serve NSLs under the RFP.
- Per 31 USC 5312(a)(2), the list includes: insured bank, commercial bank or trust company; private banker; credit union; thrift institution; broker or dealer registered with the SEC; investment banker or investment company; currency exchange; issuer, redeemer or cashier of travelers' checks, checks, money orders; operator of a credit card system; insurance company; pawnbroker; loan or finance company; travel agency; licensed sender of money; telegraph company; persons involved in real estate closings and settlements; US Postal Service; agency of US/state/local gov't carrying out any of foregoing; casino; any business similar to the above list; any business whose cash transactions have high degree of usefulness in criminal, tax or regulatory matters.

Full Credit Reports – Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information), under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte Court order.
- Section 505 of Patriot Act changed standard for FCRA Court order for consumer report – eliminated requirement that target is tied to foreign power (same change as with respect to NSLs) and created standard of relevance to an authorized investigation to protect against int'l terrorism or clandestine intelligence activities provided that an investigation of a USP is not conducted solely on the basis of first amendment rights.

Full Credit Report NSL - IT cases

- Patriot Act added 1681v to FCRA to authorize NSLs to obtain full "consumer report of a consumer and all other information in a consumer's file" (not just identity of financial institution or consumer identifying information) in IT cases only
- Full credit report to be provided to "a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct of such investigation, activity or analysis."

Full Credit Report NSL - IT cases

- Same basic approval authority as other NSLs (Deputy Director, EAD for CT/ CI; AD and all DADs for CT, General Counsel, Deputy General Counsel for National Security Affairs, Senior Counsel for National Security Affairs, ADICs and SACs in NY, D.C., LA, and all SACs in other field offices)
- Includes non-disclosure provision
- Consumer reports in non-IT cases still require court order
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Full Credit Report NSL - IT cases

- As with other NSLs, subject of NSL does not have to be target of the investigation
- Same mechanism as other NSLs – Cover EC and NSL itself
- Although no congressional reporting requirement – cover EC should still state the number of reports requested, in the event we are asked by Congress about the use of this NSL

Dissemination of NSL Information

- Information obtained through the use of NSLs may be disseminated in accordance with general standards set forth in AG guidelines – i.e, the rules that apply to information sharing with DOJ, federal, state and local authorities wherein share if information relates to the responsibility of the entity

Dissemination of NSL Information

- Per the AG guidelines, NSL information dissemination is also subject to specific statutory limitations (e.g. toll record NSL statute, ECPA, 18 USC 2709, and financial record NSL statute, RFP, 12 USC 3414(a)(5)(B), permit dissemination if per AG guidelines and information is clearly relevant to responsibilities of recipient agency; credit report 1681u NSL statute, FCRA, 15 USC 1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of a FCI investigation; no special statutory rules for dissemination of 15 USC 1681v information)

Payment for NSL Information

- NSL for toll records/email accounts, ECPA, does not provide for reimbursement of costs, although some offices do pay when requested in order to keep on good terms with service providers
- NSL for financial records, RFP, requires reimbursement of costs; Title 12, CFR Part 219, and appendix, provides reimbursement cost schedule
- NSL for financial institution information and consumer identifying information, FCRA, section 1681u, provides for payment but no schedule has been promulgated
- NSL for full credit reports, FCRA, section 1681v does not provide for reimbursement of costs

FISA - Business Records

- Under FISA, 50 USC 1861, FBI can apply to FISC for an ex parte order for business records (note: other sections of FISA say that AG applies to Court for order)
- When added to FISA in 1998, limited to business records from common carriers, public accommodations, vehicle rentals, storage facilities and standard was specific and articulable facts that records related to agent of foreign power

FISA - Business Records

- Patriot Act expanded universe of items obtainable, to "any tangible things (including books, records, papers, documents and other items)"
- Patriot Act changed legal standard: "the information to be obtained is foreign intelligence information not concerning a US person, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence gathering activities" and investigation of USP cannot be based solely on activities protected by First Amendment
- Same standard as established by Patriot Act for PR/TT, NSLs

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FISA - Business Records

- FISA permits delegation down to level of ASAC
- At current time, approval authority has been delegated to headquarters officials (Deputy Director, EAD for CT/CI; AD and all DADs of CT, CI, Cyber, General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs)
- Business records form available for field to fill out and submit to headquarters and NSLB (atty)

FISA - Business Records

- May or may not be able to get records covered by other statutes, such as tax returns or educational records - OIPR takes position that specific tax and educational records statutes govern the procurement of those records
- Library record requests will be subject to scrutiny
- Applications and FISC Orders are classified - need to go through special procedures for serving classified orders on uncleared person.

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Educational Records

- Section 507 of the Patriot Act amended the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC 1232g (aka the "Buckley amendment"), to provide for the AG to submit written application to court of competent jurisdiction (OIPR says this does not include FISC) for ex parte order requiring educational institution to provide educational records "relevant to an authorized investigation or prosecution of [certain defined federal terrorism offenses] or an act of domestic or international terrorism"
- Must provide certification that there are specific and articulable facts giving reason to believe that the education records are likely to contain information relevant to such an investigation

Educational Records

- Education records defined in FERPA as "those records, files, documents and other materials which (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."
- Educational institution is immune from liability if it complies with court order
- Institutions are not supposed to tell target of the request, since court order is ex parte, but no particular provision of statute provides for secrecy of the AG application - would need to include such provision in the court order
- General record keeping requirements of the school do not apply to the ex parte order
- Procedures for submitting a request for such an application to the AG have not been promulgated

Educational Records

- Patriot Act's amendment to Buckley was an expansion of the availability of student records, which are generally protected under 20 USC 1232g, which specifically sets forth who may be granted access to such records.
- Until this change in the Patriot Act, records were only available (and remain available) with the written consent of the student, a court order, or a GJ or law enforcement subpoena (if by court order or subpoena, student must be notified in advance of compliance unless a court orders non-disclosure)
- Thus, if have criminal nexus, can obtain such records through subpoena and can obtain court order to prevent school from notifying student of dissemination of the records

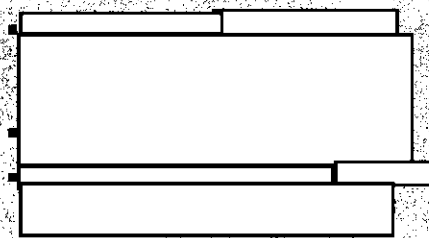
Educational Records

- Statute permits a school (but doesn't require it) to release "directory information" (name, address, telephone, DOB, field of study, dates of attendance, degrees and awards received, participation in official activities and sports, etc.) without student consent or court order
- Statute requires that students be afforded an opportunity to forbid release of directory information without their prior consent or court order
- Schools unlikely to release directory information, even though permitted, without notifying students

Educational Records

- Statute applies to student academic records so does not protect records kept by campus law enforcement or records maintained by medical professionals affiliated with the school; nor does it protect records of employees
- FBI policy, as stated from 1976 and 1996, is not to request or accept or use information from sources or other employees at educational institutions obtained from student records

Educational Records



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Tax Records

- LIMITATIONS ON TAXPAYER RETURN INFORMATION:
- Tax administration case: 26 USC 6103(h)(1)(2) - IRS employees can get access to tax records without a court order, and the information can be disseminated to DOJ/FBI employees personally and directly engaged in the proceeding, without a court order, upon request from the AG, DAG or Asst's AG to the Treasury Secretary
 - Thus, even if JTTF IRS member has access to tax records for tax administration purposes, he cannot share it with other members of JTTF unless for tax administration purposes
- Non-tax criminal case: 26 USC 6103(h)(1)(A), (B) - federal employees (including IRS and DOJ) personally and directly engaged in the proceeding can get access to taxpayer return information via an ex parte court order
 - thus, if there is a criminal nexus in your case, and you need taxpayer return information, you can obtain it through an ex parte court order

Tax Records – Taxpayer Return Information

- Intelligence case: 26 USC 6103(i)(7)(C) – provided for AG application to a federal district court for an ex parte court order to disclose taxpayer return information to federal intelligence or LE agency employees personally and directly engaged in any investigation, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity.
- However, provision expired December 31, 2003 and was renewed in October, 2004 but it has never been used.
- Thus, at present time, no way to get taxpayer return information in intelligence case if no criminal nexus

Tax Records – Return Info Other Than Taxpayer Return

- LIMITATIONS ON RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION – term defined as information gathered during course of tax investigation that did not come from taxpayer
- Non-tax criminal case: 26 USC 6301(i)(2)(A), (B) – federal employees personally and directly engaged in the proceeding can have access to return information (other than taxpayer return information) upon written request from head of agency

Tax Records – Return Info Other Than Taxpayer Return

- Intelligence case: 26 USC 6103(i)(3)(C) provided that we could get (and did get) from the IRS (including the IRS rep on JTTF) return information (other than taxpayer return information) "that may be related to a terrorist incident, threat or activity" – IRS rep needed permission to disclose from an IRS disclosure officer, once permission received, information was disseminated to FBI, and IRS disclosure officer formally notified Director of the FBI of the disclosure
- Provision intended to be used upon IRS initiation but was actually used when FBI initiated request, and IRS agreed to provide information (somewhat circumventing section 6103(i)(7)(A) – for FBI-initiated requests. See next slide)
- Provision expired December 31, 2003 and was renewed in October, 2004.

Tax Records – Return Info Other Than Taxpayer Return

- 26 USC 6103(i)(7)(A) provides for formal written request by FBI Director or his delegate to the IRS for disclosure of return information (other than taxpayer return information) to an employee personally and directly engaged in the response to or investigation of any terrorist incident, threat or activity – FBI in process of delegating that authority such that the FBI can formally make a request of the IRS for such information. (IRS requested delegation and prefers to provide information under this provision rather than 6103(i)(3)(C) since this provision was intended for use when the FBI initiated the request.)
- 26 USC 6103(i)(7)(B) – provides for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information not investigation concerning any terrorist incident, threat or activity.
- These provisions have not been used, expired December 31, 2003, but were renewed in October, 2004.

Tax Records – Return Info Other Than Taxpayer Return

- Thus, limited access to taxpayer return information if no criminal nexus
- Can get taxpayer return information other than taxpayer return in national security – terrorism related case – but not in pure intelligence case
- Per 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection or return information – thus, need to be careful when accepting any type of tax return information

DOC or IRS on disclosure matters and court orders

Tax Records – Use in Proceedings

- Per 26 USC 6103(i)(4) entitled "Use of certain disclosed returns and return information in judicial or administrative proceeding" taxpayer return information and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party – FISA application does not seem to be encompassed here
- Per 26 USC 7213, there are felony criminal penalties that attach to unauthorized disclosure of return information
- Thus, it is recommended that regardless of how you received return information, it should not be included in a FISA application

Bank Secrecy Act (BSA) Records

- Financial records that can be obtained from IRS

Thus, BSA reports available from Fin/CEN (see next slides) although also can use assistance

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FinCEN

- Financial Crimes Enforcement Network (FinCEN) (part of Treasury Dept) – provides intelligence and analytical support to law enforcement at federal, state, local, and international level, primarily through regulation of the implementation of anti-money laundering statutes such as the BSA, which require reporting and record-keeping by banks and other institutions
- Designed to fight money laundering and terrorist financing

FinCEN

- FBI rep at FinCEN is SSA [redacted]
- Intranet website is [redacted]

FinCEN

- In addition to access to the BSA database [redacted]

FinCEN

- To obtain BSA information from FinCEN, different procedures for FCI and criminal/terrorism cases [redacted]

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FinCEN

- Recent expansion of BSA report dissemination to national security cases [redacted]

FinCEN

- Available only in terrorism and money laundering cases
- Need to email [redacted] request [redacted] and an EC, both approved by SAC or ASAC, to [redacted]

Information

- [redacted] - private company [redacted]
- Has database [redacted]
- [redacted]
- POC is [redacted]
- [redacted] Can fax a request [redacted] on FBI letterhead [redacted]
- No legal process required if information is to stay within the FBI.

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National Security [redacted]

- Request [redacted]
- [redacted]
- Need Director/HQ designee approval
- 120 days
- Need [redacted]
- Need [redacted]
- [redacted] need [redacted]

QUESTIONS?

- NSLB - (202) 324- [redacted]
- [redacted]
- Visit our FBI Intranet site at
http:// [redacted]

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Investigative Tools for Intelligence Investigations

National Security Law Branch
Federal Bureau of Investigation

~~SECRET~~

National Security Letters

- NSLs – administrative subpoenas that allow the FBI to obtain three types of information:
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 - financial institution records (Right to Financial Privacy Act) (12 USC 3414(a)(5)(A))
 - credit bureau info – identity of financial institutions where consumer maintains or maintained an account; and consumer identifying information (includes names associated with person, current/former addresses and places of employment) (Fair Credit Reporting Act) (15 USC 1681u (a), (b))

National Security Letters

- Prior to Patriot Act, standard for getting NSL was that the target be tied to foreign power.
- Under Section 505 of the Patriot Act, lesser standard – only need the information to be "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment of the Constitution of the United States."
- Prior to October 31, 2003, could only get NSL in full; now can get it in PI or full investigation
- Subject of NSL does not need to be target of investigation, as long as expected information is relevant to authorized investigation

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- Currently, approval authority has been delegated to:
 - Deputy Director
 - Executive Assistant Director (EAD) for CTCI
 - Assistant Directors in charge, and all DAAs for CICT/Cyber
 - General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs
 - Assistant Director in Charge, and all SACs in NY, D.C., and LA
 - All SACs in other field divisions
- Acting SAC cannot sign NSLs
- If do not have SAC in field office, can send EC to NSLB requesting that we draft the NSL and send it out

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National Security Letters

- All NSLs should have a non-disclosure warning
- All NSLs should say that the information should be personally delivered to the FBI, not mailed
- Per OGC guidance, all NSLs must be personally served on or secure faxed to the company (even though they are not classified, the fact of a named target and a reference to an IT or intelligence investigation would imply that the target is the subject of an National Security investigation, which fact is classified)
- Delivery guidance has caused some problems and is under reconsideration by OGC

National Security Letters

- Certain NSLs have an attachment suggesting the type of information that the company may be considered to fall within the parameters of the statute. For example:

- Toll billing records

- Financial records

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National Security Letters

- The cover EC serves four functions:
 - It documents the predication for the NSL by stating why the information sought is relevant to an investigation
 - It documents the approval of the NSL by field supervisors
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- For reporting purposes, the EC must include case file number, subjects USP status, type of NSL issued, and the number of phone numbers, email addresses, account numbers or individual records being requested in the NSL

National Security Letters

- September 2004 NY SD federal court decision holding that NSL statutes are unconstitutional because they do not provide for a challenge by the recipient of the NSL to the NSL or to the non-disclosure provision; and because the non-disclosure provision is mandatory without any certification or explanation in a particular case.
- Court found a First Amendment violation in the mandatory nature of the non-disclosure provision, absence of procedure to challenge it, and absence of exception for disclosure to attorneys for legal advice, and to others in entity needed to assist in production (later provision is found in some but not all NSL statutes)
- There are now draft revisions in Congress to rectify the problems that the Court found -- to provide for a challenge by the recipient to NSL itself; to provide for a certification by the FBI that the non-disclosure provision is necessary in this particular case; to provide for a challenge by the recipient of the NSL to that certification, and to provide for mechanism for government to enforce NSL.
- In meantime, there is a stay of the Court's decision and we can continue to issue NSLs

RFPA National Security Letters

- Recent change in the statute greatly expands the definition of "financial institutions" upon which we can serve NSLs under the RFPA
- Per 31 USC 5312(a)(2), the list includes: insured bank; commercial bank or trust company; private banker; credit union; thrift institution; broker or dealer registered with the SEC; investment banker or investment company; currency exchange; issuer, redeemer or cashier of travelers' checks, checks, money orders; operator of a credit card system; insurance company; pawnbroker; loan or finance company; travel agency; licensed lender of money; telegraph company; persons involved in real estate closings and settlements; US Postal Service; agency of US/state/local gov't carrying out any of foregoing; casino; any business similar to the above list; any business whose cash transactions have high degree of usefulness in criminal, tax or regulatory matters
- List of "financial institutions" whose records are protected under RFPA remain limited, so there may be entities that could voluntarily produce their financial records under the RFPA and if they refuse to do so, so they can be subject to an NSL

Full Credit Reports - Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information), under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte court order
- Section 505 of Patriot Act changed standard for FCRA Court order for consumer report - eliminated requirement that target is tied to foreign power (same change as with respect to NSLs) and created standard of relevance to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that an investigation of a USP is not conducted solely on the basis of first amendment rights.

Full Credit Report NSL - IT cases

- Patriot Act added 1681v to FCRA to authorize NSLs to obtain full "consumer report of a consumer and all other information in a consumer's file" (not just identity of financial institution or consumer identifying information) in IT cases only
- Full credit report to be provided to "a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct of such investigation, activity or analysis."

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Full Credit Report NSL - IT cases

- Same basic approval authority as other NSLs (Deputy Director, EAD for CT/ CI; AD and all DADs for CT, General Counsel, Deputy General Counsel for National Security Affairs, Senior Counsel for National Security Affairs, ADICs and SACs in NY, D.C., LA, and all SACs in other field offices)
- Includes non-disclosure provision
- Consumer reports in non-IT cases still require court order
- [REDACTED]

Full Credit Report NSL - IT cases

- As with other NSLs, subject of NSL does not have to be target of the investigation
- Same mechanism as other NSLs – Cover EC and NSL itself
- Although no congressional reporting requirement – cover EC should still state the number of reports requested, in the event we are asked by Congress about the use of this NSL

Dissemination of NSL Information

- Information obtained through the use of NSLs may be disseminated in accordance with general standards set forth in AG guidelines – i.e. the rules that apply to information sharing with DOJ, federal, state and local authorities wherein share if information relates to the responsibility of the entity

Dissemination of NSL Information

- Per the AG guidelines, NSL information dissemination is also subject to specific statutory limitations (e.g. toll record NSL statute, ECPA, 18 USC 2709, and financial record NSL statute, RFP, 12 USC 3414(a)(5)(B), permit dissemination if per AG guidelines and information is clearly relevant to responsibilities of recipient agency; credit report 1681u NSL statute, FCRA, 15 USC 1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of a FCI investigation; no special statutory rules for dissemination of 15 USC 1681v information)

Payment for NSL Information

- NSL for toll records/email accounts, ECPA, does not provide for reimbursement of costs, although some offices do pay when requested in order to keep on good terms with service providers.
- NSL for financial records, RFP, requires reimbursement of costs; Title 12, CFR Part 219, and appendix, provides reimbursement cost schedule
- NSL for financial institution information and consumer identifying information, FCRA, section 1681u, provides for payment but no schedule has been promulgated
- NSL for full credit reports, FCRA, section 1681v does not provide for reimbursement of costs.

FISA - Business Records

- Under FISA, 50 USC 1861, FBI can apply to FISC for an ex parte order for business records (note: other sections of FISA say that AG applies to Court for order)
- When added to FISA in 1998, limited to business records from common carriers, public accommodations, vehicle rentals, storage facilities and standard was specific and articulable facts that records related to agent of foreign power.

FISA - Business Records

- Patriot Act expanded universe of items obtainable, to "any tangible things (including books, records, papers, documents and other items)"
- Patriot Act changed legal standard: "the information to be obtained is foreign intelligence information not concerning a US person, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence gathering activities" and investigation of USP cannot be based solely on activities protected by First Amendment
- Same standard as established by Patriot Act for PR/TT; NSLs

FISA - Business Records

- FISA permits delegation down to level of ASAC
- At current time, approval authority has been delegated to headquarters officials (Deputy Director; EAD for CT/CI; AD and all DADs of CT, CI, Cyber; General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs)
- Business records form available for field to fill out and submit to headquarters and NSLB (atty)

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FISA - Business Records

- May or may not be able to get records covered by other statutes, such as tax returns or educational records – OIPR takes position that specific tax and educational records statutes govern the procurement of those records
- Library record requests will be subject to scrutiny
- Applications and FISC Orders are classified – need to go through special procedures for serving classified orders on unclassified person.
- We have only obtained seven business record orders so far, and provision sunsets this December, 2005

Educational Records

- Section 507 of the Patriot Act amended the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC 1232g (aka the "Buckley amendment"), to provide for the AG to submit written application to court of competent jurisdiction (OIPR says this does not include FISC) for ex parte order requiring educational institution to provide educational records "relevant to an authorized investigation or prosecution of [certain defined federal terrorism offenses] or an act of domestic or international terrorism"
- Must provide certification that there are specific and articulable facts giving reason to believe that the education records are likely to contain information relevant to such an investigation

Educational Records

- Education records defined in FERPA as "those records, files, documents and other materials which (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."
- Educational institution is immune from liability if it complies with court order
- Institutions are not supposed to tell target of the request, since court order is ex parte, but no particular provision of statute provides for secrecy of the AG application – would need to include such provision in the court order
- General record keeping requirements of the school do not apply to the ex parte order
- Procedures for submitting a request for such an application to the AG have not been promulgated

Educational Records

- Patriot Act's amendment to Buckley was an expansion of the availability of student records, which are generally protected under 20 USC 1232g, which specifically sets forth who may be granted access to such records.
- Until this change in the Patriot Act, records were only available (and remain available) with the written consent of the student, a court order, or a GJ or law enforcement subpoena (if by court order or subpoena, student must be notified in advance of compliance unless a court orders non-disclosure)
- Thus, if have criminal nexus, can obtain such records through subpoena and can obtain court order to prevent school from notifying student of dissemination of the records

Educational Records

- Statute permits a school (but doesn't require it) to release "directory information" (name, address, telephone, DOB, field of study, dates of attendance, degrees and awards received, participation in official activities and sports, etc.) without student consent or court order
- Statute requires that students be afforded an opportunity to forbid release of directory information without their prior consent or court order
- Schools unlikely to release directory information, even though permitted, without notifying students

Educational Records

- Statute applies to student academic records so does not protect records kept by campus law enforcement or records maintained by medical professionals affiliated with the school; nor does it protect records of employees
- FBI policy, as stated from 1976 and 1996, is not to request or accept or use information from sources or other employees at educational institutions obtained from student records

Educational Records

Tax Records

- LIMITATIONS ON TAXPAYER RETURN INFORMATION:
 - Tax administration case: 26 USC 6103(A)(1)(2) - IRS employees can get access to tax records without a court order, and the information can be disseminated to DOJ/FBI employees personally and directly engaged in the proceeding without a court order, upon request from the AG, DAG or Asst. AG to the Treasury Secretary
 - Thus, even if JTTF IRS member has access to tax records for tax administration purposes, he cannot share it with other members of JTTF unless for tax administration purposes.
 - Non-tax criminal case: 26 USC 6103(i)(1)(A), (B) - federal employees (including IRS and DOJ) personally and directly engaged in the proceeding can get access to taxpayer return information via an ex parte court order
 - thus, if there is a criminal nexus in your case, and you need taxpayer return information, you can obtain it through an ex parte court order

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Tax Records – Taxpayer Return Information

- Intelligence case: 26 USC 6103(i)(7)(C) – provides for AG application to a federal district court for an ex parte court order to disclose taxpayer return information to federal intelligence or I.E. agency employees personally and directly engaged in any investigation, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity.
- Provision expired December 31, 2003; was renewed in October, 2004; it has never been used but procedures are being drafted.
- However, at present time, no way to get taxpayer return information in intelligence case if no criminal nexus

Tax Records – Return Info Other Than Taxpayer Return

- LIMITATIONS ON RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION – term defined as information gathered during course of tax investigation that did not come from taxpayer
- Non-tax criminal case: 26 USC 6301(i)(2)(A), (B) – federal employees personally and directly engaged in the proceeding can have access to return information (other than taxpayer return information) upon written request from head of agency

Tax Records – Return Info Other Than Taxpayer Return

- Intelligence case: 26 USC 6103(i)(3)(C) provides that we can obtain (and have obtained) from the IRS (including the IRS rep on JTTF) return information (other than taxpayer return information) "that may be related to a terrorist incident, threat or activity" – IRS rep needed permission to disclose from an IRS disclosure officer, once permission received, information was disseminated to FBI, and IRS disclosure officer formally notified Director of the FBI of the disclosure
- Provision intended to be used upon IRS initiation but was actually used when FBI initiated request, and IRS agreed to provide information (somewhat circumventing section 6103(i)(7)(A) – for FBI-initiated requests. See next slide)
- Provision expired December 31, 2003, was renewed in October, 2004, and will sunset December 31, 2005.

Tax Records – Return Info Other Than Taxpayer Return

- 26 USC 6103(i)(7)(A) provides for formal written request by FBI Director or his delegate to the IRS for disclosure of return information (other than taxpayer return information) to an employee personally and directly engaged in the response to or investigation of any terrorist incident, threat, or activity – FBI in process of delegating that authority such that the FBI can formally make a request of the IRS for such information. (IRS requested delegation and prefers to provide information under this provision rather than 6103(i)(3)(C) since this provision was intended for use when the FBI initiated the request.)
- This provision has not been used, expired December 31, 2003, was renewed in October, 2004, and will sunset December 31, 2005.
- Per IRS request, FBI is in the process of delegating Director's authority pursuant to 6103(i)(7)(A) so that it can be used as the method of getting this information from the IRS rather than 6103(i)(3)(C)

Tax Records – Return Info Other Than Taxpayer Return

- 26 USC 6103(i)(7)(B) – provides for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information nor investigation concerning any terrorist incident, threat or activity.
- This provision has not been used, expired December 31, 2003, was renewed in October, 2004, and will sunset December 31, 2005.

Tax Records – Return Info Other Than Taxpayer Return

- Thus, limited access to taxpayer return information if no criminal nexus
- Can get taxpayer return information other than taxpayer return in national security – terrorist related case – but not in pure intelligence case.
- Per 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection of return information – thus, need to be careful when accepting any type of tax return information from IRS
- POC at IRS on disclosure matters and court orders [redacted]
- All request must [redacted]

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Tax Records – Use in Proceedings

- Per 26 USC 6103(i)(4) entitled "Use of certain disclosed returns and return information in judicial or administrative proceeding" – taxpayer return information and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party – FISA application does not seem to be encompassed here.
- Per 26 USC 7213, there are felony criminal penalties that attach to unauthorized disclosure of return information obtained from IRS
- Thus, it is recommended that any information obtained from IRS not be used in a FISA application.
- If tax information obtained from another lawful source, no restrictions on use in FISA application.

Bank Secrecy Act (BSA) Records

- Financial records that can be obtained from IRS:

Thus, BSA reports available from FinCEN (see next slides).

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FinCEN	
■	Financial Crimes Enforcement Network (FinCEN) (part of Treasury Dept) – provides intelligence and analytical support to law enforcement at federal, state, local, and international level, primarily through regulation of the implementation of anti-money laundering statutes such as the BSA, which require reporting and record-keeping by banks and other institutions
■	Designed to fight money laundering and terrorist financing
■	

FinCEN	
■	FBI rep at FinCEN is SSA [redacted]
■	Intranet website is http://[redacted]

FinCEN	
■	In addition to access to the BSA database [redacted]

FinCEN	
■	To obtain BSA information from FinCEN, different procedures for civil and criminal/terrorism cases [redacted]

FinCEN	
■	[redacted]
■	Recent expansion of BSA report dissemination to national security cases
■	[redacted]

FinCEN	
■	[redacted]
■	Available only in terrorism and money laundering cases
■	Need to email [redacted] request [redacted]
■	[redacted] and an EC both approved by SAC or ASAC, to [redacted]

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Investigative Tools for Intelligence Investigations

National Security Law Branch
Federal Bureau of Investigation

National Security Letters

- **NSLs – administrative subpoenas that allow the FBI to obtain three types of information:**
 - phone and email communication records from telephone companies and internet service providers (Electronic Comm. Privacy Act) (18 USC 2709) (same information as gathered in pen register/TT except historic, not live)
 - financial institution records (Right to Financial Privacy Act) (12 USC 3414(a)(5)(A))
 - credit bureau info – identity of financial institutions where consumer maintains or maintained an account; and consumer identifying information (includes names associated with person, current/former addresses and places of employment) (Fair Credit Reporting Act) (15 USC 1681u (a), (b))

National Security Letters

- Prior to Patriot Act, standard for getting NSL was that the target be tied to foreign power.
- Under Section 505 of the Patriot Act, lesser standard – only need the information to be “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment of the Constitution of the United States.”
- Prior to October 31, 2003, could only get NSL in full; now can get it in PI or full investigation
- Subject of NSL does not need to be target of investigation, as long as expected information is relevant to authorized investigation

National Security Letters

- Prior to Patriot Act, approval authority could be no lower than Deputy Assistant Director; Patriot Act allowed delegation down to the SACs
- Currently, approval authority has been delegated to:
 - Deputy Director
 - Executive Assistant Director (EAD) for C/CI
 - Assistant Directors in charge, and all DAAs for C/CI/C/IS
 - General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs
 - Assistant Director in Charge, and all SACs in NY, D.C., and LA
 - All SACs in other field divisions
- Acting SAC cannot sign NSLs.
- If do not have SAC in field office, can send EC to NSLB requesting that we draft the NSL and send it out

National Security Letters

- For all NSLs, issuing office must prepare two documents: (1) the NSL itself; and (2) an EC approving the NSL and documenting the prediction
- All NSLs must be addressed to the specific company point of contact (many of which are listed on NSLB's website)
- All NSLs should identify the statutory authority for the request, the type of records requested, and provide identifying information to assist the company in processing the request.
- All NSLs require a certification that the records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities and that an investigation of a USP is not conducted solely on the basis of first amendment rights.

National Security Letters

- All NSLs should have a non-disclosure warning
- All NSLs should say that the information should be personally delivered to the FBI, not mailed
- All NSLs must be personally served on or secure faxed to the company (even though they are not classified, the fact of a named target and a reference to an IT or intelligence investigation would imply that the target is the subject of a National Security investigation, which fact is classified)

National Security Letters

- Certain NSLs have an attachment suggesting the type of information that the company may considered to fall within the parameters of the statute. For example:

- Toll billing records

- Financial records

National Security Letters

- The cover EC serves four functions:

- It documents the predication for the NSL by stating why the information sought is relevant to an investigation
- It documents the approval of the NSL by field supervisors
- It contains information needed to fulfill Congressional reporting requirements for each type of NSL
- It transmits the NSL to the requesting squad or delivering field division for delivery

- For reporting purposes, the EC must include case file number, subjects USP status, type of NSL issued, and the number of phone numbers, email addresses, account numbers or individual records being requested in the NSL

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National Security Letters

- September 2004 NY SD federal court decision holding that NSL statutes are unconstitutional because they do not provide for a challenge by the recipient of the NSL to the NSL or to the non-disclosure provision; and because the non-disclosure provision is mandatory without any certification or explanation in a particular case.
- Court found a First Amendment violation in the mandatory nature of the non-disclosure provision, absence of procedure to challenge it, and absence of exception for disclosure to attorneys for legal advice, and to others in entity needed to assist in production (later provision is found in some but not all NSL statutes)
- There are now draft revisions in Congress to rectify the problems that the Court found - to provide for a challenge by the recipient to NSL itself; to provide for a certification by the FBI that the non-disclosure provision is necessary in this particular case; to provide for a challenge by the recipient of the NSL to that certification; and to provide for mechanism for government to enforce NSL
- In meantime, there is a stay of the Court's decision and we can continue to issue NSL's

ECPA NLS

- Wide variety of information that we may obtain under "toll billing records"

- Should contact ECAU in formulating NSL language - see their website as to the POC

<http://www.fbi.gov/ncj/185111.htm>

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RFPA National Security Letters

- Recent change in the statute greatly expands the definition of "financial institutions" upon which we can serve NSLs under the RFPA
- Per 31 USC 5312(a)(2), the list includes: insured bank; commercial bank or trust company; private banker; credit union; thrift institution; broker or dealer registered with the SEC; investment banker or investment company; currency exchange; issuer, redeemer or cashier of travelers' checks, checks, money orders; operator of a credit card system; insurance company; pawnbroker; loan or finance company; travel agency; licensed sender of money; telegraph company; persons involved in real estate closings and settlements; US Postal Service; agency of US/state/local gov't carrying out any of foregoing; casino; any business similar to the above list; any business whose cash transactions have high degree of usefulness in criminal, tax or regulatory matters

Full Credit Reports - Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information), under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte Court order
- Section 505 of Patriot Act changed standard for FCRA Court order for consumer report - eliminated requirement that target is tied to foreign power (same change as with respect to NSLs) and created standard of relevance to an authorized investigation to protect against int'l terrorism or clandestine intelligence activities provided that an investigation of a USP is not conducted solely on the basis of first amendment rights

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- Includes non-disclosure provision
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- Same standard as established by Patriot Act for PR/TT: NSLs

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Tax Records

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- Tax administration case: 26 USC 6103(h)(1),(2) - IRS employees can get access to tax records without a court order, and the information can be disseminated to DOJ/FBI employees personally and directly engaged in the proceeding, without a court order, upon request from the AG, DAG or Asst AG to the Treasury Secretary
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- 26 USC 6103(h)(7)(B) – provides for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information nor investigation concerning any terrorist incident, threat or activity.
- These provisions have not been used, expired December 31, 2003, but were renewed in October, 2004.

- 26 USC 6103(i)(7)(A) provides for formal written request by FBI Director or his delegate to the IRS for disclosure of return information (other than taxpayer return information) to an employer personally and directly engaged in the response to or investigation of any terrorist incident, threat or activity – FBI in process of designating that authority such that the FBI can formally make a request of the IRS for such information (IRS requested designation and protection of return information) – this provision rather than 6103(i)(2)(C) since this provision was intended for use when the FBI initiated the request).
- 26 USC 6103(i)(7)(B) – provides for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and need such information to determine and/or investigate concerning any terrorist incident, threat or activity.
- These provisions have not been used, expired December 31, 2003, but were renewed in October, 2004.

Tax Records – Return Info Other Than Taxpayer Return

- Thus, limited access to taxpayer return information if no criminal nexus
- Can get taxpayer return information other than taxpayer return in national security – terrorism related case – but not in pure intelligence case
- For 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection or return information – thus, need to be careful when accepting any type of tax return information
- FOIA as IRS on disclosure matters and court orders – [redacted]
- As a general matter, can get taxpayer return information if not getting it from the IRS

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- Per 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection or return information - thus, need to be careful when accepting any type of tax return information
- POC at IRS on disclosure matters and court orders - [redacted]
- As a general matter, can get taxpayer return information if not getting it from the IRS

Tax Records – Use in Proceedings

- Per 26 USC 6103(i)(4) entitled “Use of certain disclosed returns and return information in judicial or administrative proceeding” – taxpayer return information, and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party – FISA application does not seem to be encompassed here.
- Per 26 USC 9213, there are felony criminal penalties that attach to unauthorized disclosure of return information
- Thus, it is recommended that regardless of how you received return information, it should not be included in a FISA application

- Per 26 USC 6103(i)(4) entitled "Use of certain disclosed returns and return information in judicial or administrative proceeding" – taxpayer return information, and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party to a suit, and in any other proceeding in which a taxpayer is a party.
- Per 26 USC 7213, there are felony criminal penalties that attach to unauthorized disclosure of return information
- Thus, it is recommended that regardless of how you received return information, it should not be included in a FISA application

Bank Secrecy Act (BSA) Records

Financial records that can be obtained [redacted]

[redacted]

Thus, BSA reports available from FinCEN (see next slides), although also can use assistance [redacted]

[redacted]

Financial records that can be obtained

Thus, BSA reports available from FinCEN (see next slides), although also can use assistance

FinCEN

- Financial Crimes Enforcement Network (FinCEN) (part of Treasury Dept) – provides intelligence and analytical support to law enforcement at federal, state, local, and international level, primarily through regulation of the implementation of anti-money laundering statutes such as the BSA, which require reporting and record-keeping by banks and other institutions
- Designed to fight money laundering and terrorist financing

FinCEN

- FBI rep at FinCEN is SSA [redacted]
- Intranet website [redacted]

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FinCEN

- In addition to access to the BSA database [redacted]

FinCEN

- To obtain BSA information from FinCEN, different procedures for PCI and criminal/terrorism cases [redacted]

FinCEN

- Recent expansion of BSA report dissemination to national security cases [redacted]

FinCEN

- Available only in terrorism and money laundering cases
- Need to email [redacted] request [redacted] and an EC, both approved by SAC or ASAC, to [redacted]

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<div>Information</div>	
■	[redacted] private comment [redacted]
■	Has database [redacted]
■	[redacted]
■	POC: [redacted] Can fax a request [redacted] on FBI letterhead [redacted]
■	No legal process required if information is to stay within the FBI

<div>National Security [redacted]</div>	
■	Request to [redacted]
■	[redacted]
■	Need Director/HQ designee approval
■	120 days
■	Need [redacted]
■	Need [redacted]
■	[redacted] need [redacted]

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<div>QUESTIONS?</div>	
■	NSLB - (202) 324 [redacted]
■	[redacted]
■	Visit our FBI Intranet site at http:// [redacted]

[redacted] (OGC) (FBI)

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From: [redacted] (OGC) (FBI)
Sent: Friday, November 04, 2005 7:34 AM
To: [redacted] (OGC) (OGA)
Subject: RE: NSL powerpoint

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

(1 document attached 6/19/06)

b5 I have others, if you are interested. [redacted]

[redacted]

[redacted]

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-----Original Message-----
From: [redacted] (OGC) (OGA)
Sent: Thursday, November 03, 2005 10:51 AM
To: [redacted] (OGC) (FBI)
Subject: NSL powerpoint

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

[redacted]

Please send me your latest NSL powerpoint so that I can put it in our electronic library. Thanks.

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[redacted]
Assistant General Counsel
National Security Law Branch
(202) 324-[redacted]

SENSITIVE BUT UNCLASSIFIED

SENSITIVE BUT UNCLASSIFIED

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-12-2007 BY 65179 DHM/TAM/KSP/JE

NSL-VIO-2739

6/19/2006

National Security Letters

National Security Law Branch
Federal Bureau of Investigation

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National Security Letters

- **NSLs – administrative subpoenas that allow the FBI to obtain three types of information:**
 - Phone and email communication records from telephone companies and internet service providers (Electronic Comm. Privacy Act) (18 USC 2709) (same information as gathered in pen register/TT except historic, not live)
 - Financial institution records (Right to Financial Privacy Act) (12 USC 3414(a)(5)(A))
 - Credit bureau info – identity of financial institutions where consumer maintains or maintained an account; and consumer identifying information (includes names associated with person, current/former addresses and places of employment) (Fair Credit Reporting Act) (15 USC 1681u(a), (b))

National Security Letters

- Prior to Patriot Act, standard for getting NSL was that the target be tied to foreign power.
- Under Section 505 of the Patriot Act, lesser standard – only need the information to be “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment of the Constitution of the United States.”
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 - Assistant Directors in charge, and all DAAs for C/CTC/Cyber
 - General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs
 - Assistant Director in Charge, and all SACs in NY, D.C., and LA
 - All SACs in other field divisions
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- If do not have SAC in field office, can send EC to NSLB requesting that we draft the NSL and send it out

National Security Letters

- For all NSLs, issuing office must prepare two documents: (1) the NSL itself, and (2) an EC approving the NSL and documenting the prediction
- All NSLs must be addressed to the specific company point of contact (many of which are listed on NSLB's website)
- All NSLs should identify the statutory authority for the request, the type of records requested, and provide identifying information to assist the company in processing the request
- All NSLs require a certification that the records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities and that an investigation of a USP is not conducted solely on the basis of first amendment rights.

National Security Letters

- All NSLs should have a non-disclosure warning
- All NSLs should say that the information should be personally delivered to the FBI or sent by a restricted delivery service, not mailed nor sent by non-secure fax
- Per OG C guidance, all NSLs must be personally served on or sent by restricted delivery service, not mailed or sent by non-secure fax to the company (even though they are not classified, the fact of a named target and a reference to an IT or intelligence investigation would imply that the target is the subject of an National Security investigation, which fact is classified)
- All NSLs should have a reasonable return date

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National Security Letters

- Certain NSLs have an attachment suggesting the type of information that the company may be considered to fall within the parameters of the statute. For example:

- Toll billing records



- Financial records



National Security Letters

- The cover EC serves four functions:

- It documents the predication for the NSL by stating why the information sought is relevant to an investigation
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- It transmits the NSL to NSLB, CTD/CV Cyber, and the requesting squad or delivering field division for delivery if necessary

- For reporting purposes, the EC must include case file number, subjects USP status, type of NSL issued, and the number of phone numbers, email addresses, account numbers or individual records being requested in the NSL

National Security Letters

- September 2004 NY SD federal court decision holding that NSL statutes are unconstitutional because they do not provide for a challenge by the recipient of the NSL to the NSL or to the non-disclosure provision; and because the non-disclosure provision is mandatory without any certification or explanation in a particular case.
- Court found a First Amendment violation in the mandatory nature of the non-disclosure provision, absence of procedure to challenge it, and absence of exception for disclosure to attorneys for legal advice, and to others in entity needed to assist in production (later provision is found in some but not all NSL statutes)
- There are now draft revisions in Congress to rectify the problems that the Court found - to provide for a challenge by the recipient to NSL itself; to provide for a certification by the FBI that the non-disclosure provision is necessary in this particular case; to provide for a challenge by the recipient of the NSL to that certification; and to provide for mechanism for government to enforce NSL.
- In meantime, there is a stay of the Court's decision and we can continue to issue NSLs.

RFPA National Security Letters

- October 2003 change in the statute greatly expands the definition of "financial institutions" upon which we can serve NSLs under the RFPA
- Per 31 USC 5312(a)(2), the list includes: insured bank; commercial bank or trust company; private banker; credit union; thrift institution; broker or dealer registered with the SEC; investment banker or investment company; currency exchanger; issuer, redeemer or cashier of travelers' checks, checks, money orders; operator of a credit card system; insurance company; pawnbroker; loan or finance company; travel agency; licensed sender of money; telegraph company; person involved in real estate closings and settlements; US Postal Service; agency of US/state/local gov't carrying out any of foregoing; casino; any business similar to the above list; any business whose cash transactions have high degree of usefulness in criminal, tax or regulatory matters
- List of "financial institutions" whose records are protected under RFPA remains limited, so there may be entities that could voluntarily produce their financial records under the RFPA. If they refuse to do so, they can be subject to an NSL.

Full Credit Reports - Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information), under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte Court order
- Section 505 of Patriot Act changed standard for FCRA Court order for consumer report - eliminated requirement that target is tied to foreign power (same change as with respect to NSLs) and created standard of relevance to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that an investigation of a USP is not conducted solely on the basis of first amendment rights.

Full Credit Report NSL - IT cases

- Patriot Act added 1681v to FCRA to authorize NSLs to obtain full "consumer report of a consumer and all other information in a consumer's file" (not just identity of financial institution or consumer identifying information) in IT cases only
- Full credit report to be provided to "a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct of such investigation, activity or analysis."

Full Credit Report NSL - IT cases

- Same basic approval authority as other NSLs (Deputy Director, EAD for CT/ CI; AD and all DADs for CT, General Counsel, Deputy General Counsel for National Security Affairs, Senior Counsel for National Security Affairs, ADICs and SACs in NY, D.C., LA, and all SACs in other field offices)
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- Consumer reports in non-IT cases still require court order
- [REDACTED]

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Dissemination of NSL Information

- Information obtained through the use of NSLs may be disseminated in accordance with general standards set forth in The AG's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSIG) – i.e, the rules that apply to information sharing with DOJ, federal, state and local authorities wherein share if information relates to the responsibility of the entity

Dissemination of NSL Information

- Per the NSIG, NSL information dissemination is also subject to specific statutory limitations (e.g. toll record NSL statute, ECPA, 18 USC 2709, and financial record NSL statute, RFPA, 12 USC 3414(a)(5)(B), permit dissemination if per the NSIG and information is clearly relevant to responsibilities of recipient agency; credit report 1681u NSL statute, FCRA, 15 USC 1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of a FCI investigation; no special statutory rules for dissemination of 15 USC 1681v information)

Payment for NSL Information

- NSL for toll records/email accounts, ECPA, does not provide for reimbursement of costs, although some offices do pay when requested in order to keep on good terms with service providers
- NSL for financial records, RFPA, requires reimbursement of costs; Title 12, CFR Part 219, and appendix, provides reimbursement cost schedule
- NSL for financial institution information and consumer identifying information, FCRA, section 1681u, provides for payment but no schedule has been promulgated
- NSL for full credit reports, FCRA, section 1681v does not provide for reimbursement of costs

QUESTIONS?

- NSLB - (202) 324-3951

- Visit our FBI Intranet site at [http://\[REDACTED\]](http://[REDACTED])

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Output From: FBINET

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-12-2007 BY 65179 DHM/TAM/KSR/JB

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National Security Letters

National Security Law Branch
Federal Bureau of Investigation

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- List of "financial institutions" whose records are protected under RFP remains limited, so there may be entities that could voluntarily produce their financial records under the RFP and if they refuse to do so, so they can be subject to an NSL

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QUESTIONS?

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- [redacted]
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[REDACTED] (OGC) (FBI)

From: [REDACTED] (OGC) (FBI)

Sent: Tuesday, November 23, 2004 11:12 AM

To: [REDACTED] (FBI)

Subject: NSLs

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SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Enclosed is the NSL powerpoint that I promised you yesterday. Slide 18 deals with NSL reimbursement. Let me know if you have any questions. [REDACTED]

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HEREIN IS UNCLASSIFIED
DATE 07-12-2007 BY 65179 DHM/TAM/KSR/JB

NSL VIO-2747

6/5/2006

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Investigative Tools for Intelligence Investigations

National Security Law Branch
Federal Bureau of Investigation

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ECPA NLS

- Wide variety of information that we may obtain under "toll billing records"
- Should contact ECAU in formulating NSL language - see their website as to the POC: <http://www.fbi.gov/epa>

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RFPA National Security Letters

- Recent change in the statute greatly expands the definition of "financial institutions" upon which we can serve NSLs under the RFPA
- Per 31 USC 5312(a)(2), the list includes: insured bank; commercial bank or trust company; private banker; credit union; thrift institution; broker or dealer registered with the SEC; investment banker or investment company; currency exchange; issuer, redeemer or cashier of travelers' checks, checks, money orders; operator of a credit card system; insurance company; pawnbroker; loan or finance company; travel agency; licensed sender of money; telegraph company; persons involved in real estate closings and settlements; US Postal Service; agency of US/state/local gov't carrying out any of foregoing; casino; any business similar to the above list; any business whose cash transactions have high degree of usefulness in criminal, tax or regulatory matters

Full Credit Reports - Court Order

- In addition to FCRA, 15 USC 1681u(a) and (b) information (financial institutions and consumer identifying information), under 15 USC 1681u(c), can get full consumer report in CI and CT cases by ex parte Court order
- Section 505 of Patriot Act changed standard for FCRA Court order for consumer report - eliminated requirement that target is tied to foreign power (same change as with respect to NSLs) and created standard of relevance to an authorized investigation to protect against int'l terrorism or clandestine intelligence activities provided that an investigation of a USP is not conducted solely on the basis of first amendment rights

Full Credit Report NSL - IT cases

- Patriot Act added 1681v to FCRA to authorize NSLs to obtain full "consumer report of a consumer and all other information in a consumer's file" (not just identity of financial institution or consumer identifying information) in IT cases only
- Full credit report to be provided to "a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct of such investigation, activity or analysis."

Full Credit Report NSL - IT cases

- Same basic approval authority as other NSLs (Deputy Director, EAD for CT/ CI; AD and all DADs for CT, General Counsel, Deputy General Counsel for National Security Affairs, Senior Counsel for National Security Affairs, ADICs and SACs in NY, D.C., LA, and all SACs in other field offices)
- Includes non-disclosure provision
- Consumer reports in non-IT cases still require court order

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Full Credit Report NSL - IT cases

- As with other NSLs, subject of NSL does not have to be target of the investigation
- Same mechanism as other NSLs – Cover EC and NSL itself
- Although no congressional reporting requirement – cover EC should still state the number of reports requested, in the event we are asked by Congress about the use of this NSL

Dissemination of NSL Information

- Information obtained through the use of NSLs may be disseminated in accordance with general standards set forth in AG guidelines – i.e, the rules that apply to information sharing with DOJ, federal, state and local authorities wherein share if information relates to the responsibility of the entity

Dissemination of NSL Information

- Per the AG guidelines, NSL information dissemination is also subject to specific statutory limitations (e.g. toll record NSL statute, ECPA, 18 USC 2709, and financial record NSL statute, RFP, 12 USC 3414(a)(5)(B), permit dissemination if per AG guidelines and information is clearly relevant to responsibilities of recipient agency; credit report 1681u NSL statute, FCRA, 15 USC 1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of a FCI investigation; no special statutory rules for dissemination of 15 USC 1681v information)

Payment for NSL Information

- NSL for toll records/email accounts, ECPA, does not provide for reimbursement of costs, although some offices do pay when requested in order to keep on good terms with service providers
- NSL for financial records, RFP, requires reimbursement of costs; Title 12, CFR Part 219, and appendix, provides reimbursement cost schedule
- NSL for financial institution information and consumer identifying information, FCRA, section 1681u, provides for payment but no schedule has been promulgated
- NSL for full credit reports, FCRA, section 1681v does not provide for reimbursement of costs

FISA - Business Records

- Under FISA, 50 USC 1861, FBI can apply to FISC for an ex parte order for business records (note: other sections of FISA say that AG applies to Court for order)
- When added to FISA in 1998, limited to business records from common carriers, public accommodations, vehicle rentals, storage facilities and standard was specific and articulable facts that records related to agent of foreign power

FISA - Business Records

- Patriot Act expanded universe of items obtainable, to "any tangible things (including books, records, papers, documents and other items)"
- Patriot Act changed legal standard: "the information to be obtained is foreign intelligence information not concerning a US person, or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence gathering activities" and investigation of USP cannot be based solely on activities protected by First Amendment
- Same standard as established by Patriot Act for PR/TT; NSLs

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FISA - Business Records

- FISA permits delegation down to level of ASAC
- At current time, approval authority has been delegated to headquarters officials (Deputy Director, EAD for CT/CI, AD and all DADs of CT, CI, Cyber, General Counsel, Deputy General Counsel for National Security Affairs, and Senior Counsel for National Security Affairs)
- Business records form available for field to fill out and submit to headquarters and NSLB (atty)

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FISA - Business Records

- May or may not be able to get records covered by other statutes, such as tax returns or educational records - OIPR takes position that specific tax and educational records statutes govern the procurement of those records
- Library record requests will be subject to scrutiny
- Applications and FISC Orders are classified - need to go through special procedures for serving classified orders on uncleared person.

Educational Records

- Section 507 of the Patriot Act amended the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC 1232g (aka the "Buckley amendment"), to provide for the AG to submit written application to court of competent jurisdiction (OIPR says this does not include FISC) for ex parte order requiring educational institution to provide educational records "relevant to an authorized investigation or prosecution of [certain defined federal terrorism offenses] or an act of domestic or international terrorism"
- Must provide certification that there are specific and articulable facts giving reason to believe that the education records are likely to contain information relevant to such an investigation

Educational Records

- Education records defined in FERPA as "those records, files, documents and other materials which (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."
- Educational institution is immune from liability if it complies with court order
- Institutions are not supposed to tell target of the request, since court order is ex parte, but no particular provision of statute provides for secrecy of the AG application - would need to include such provision in the court order
- General record keeping requirements of the school do not apply to the ex parte order
- Procedures for submitting a request for such an application to the AG have not been promulgated

Educational Records

- Patriot Act's amendment to Buckley was an expansion of the availability of student records, which are generally protected under 20 USC 1232g, which specifically sets forth who may be granted access to such records.
- Until this change in the Patriot Act, records were only available (and remain available) with the written consent of the student, a court order, or a GJ or law enforcement subpoena (if by court order or subpoena, student must be notified in advance of compliance unless a court orders non-disclosure)
- Thus, if have criminal nexus, can obtain such records through subpoena and can obtain court order to prevent school from notifying student of dissemination of the records

Educational Records

- Statute permits a school (but doesn't require it) to release "directory information" (name, address, telephone, DOB, field of study, dates of attendance, degrees and awards received, participation in official activities and sports, etc.) without student consent or court order
- Statute requires that students be afforded an opportunity to forbid release of directory information without their prior consent or court order
- Schools unlikely to release directory information, even though permitted, without notifying students

Educational Records

- Statute applies to student academic records so does not protect records kept by campus law enforcement or records maintained by medical professionals affiliated with the school; nor does it protect records of employees
- FBI policy, as stated from 1976 and 1996, is not to request or accept or use information from sources or other employees at educational institutions obtained from student records

Educational Records

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Tax Records

- LIMITATIONS ON TAXPAYER RETURN INFORMATION:
- Tax administration case: 26 USC 6103(b)(1),(2) - IRS employees can get access to tax records without a court order, and the information can be disseminated to DOJ/FBI employees personally and directly engaged in the proceeding, without a court order, upon request from the AG, DAG or Asst AG to the Treasury Secretary
 - Thus, even if JTTF IRS member has access to tax records for tax administration purposes, he cannot share it with other members of JTTF unless for tax administration purposes.
- Non-tax criminal case: 26 USC 6103(h)(1)(A), (B) - federal employees (including IRS and DOJ) personally and directly engaged in the proceeding can get access to taxpayer return information via an ex parte court order
 - thus, if there is a criminal nexus in your case, and you need taxpayer return information, you can obtain it through an ex parte court order

Tax Records -- Taxpayer Return Information

- Intelligence case: 26 USC 6103(i)(7)(C) - provided for AG application to a federal district court for an ex parte court order to disclose taxpayer return information to federal intelligence or LE agency employees personally and directly engaged in any investigation, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity.
- However, provision expired December 31, 2003 and was never used and never renewed
- Thus, at present time, no way to get taxpayer return information in intelligence case if no criminal nexus

Tax Records – Return Info Other Than Taxpayer Return

- **LIMITATIONS ON RETURN INFORMATION OTHER THAN TAXPAYER RETURN INFORMATION** – term defined as information gathered during course of tax investigation that did not come from taxpayer
- **Non-tax criminal case:** 26 USC 6301(i)(2)(A), (B) – federal employees personally and directly engaged in the proceeding can have access to return information (other than taxpayer return information) upon written request from head of agency

Tax Records – Return Info Other Than Taxpayer Return

- **Intelligence case:** 26 USC 6103(i)(3)(C) provided that we could get (and did get) from the IRS (including the IRS rep on JTTF) return information (other than taxpayer return information) "that may be related to a terrorist incident, threat or activity" – IRS rep needed permission to disclose from an IRS disclosure officer, once permission received, information was disseminated to FBI, and IRS disclosure officer formally notified Director of the FBI of the disclosure
- However, that provision expired December 31, 2003 and has not been renewed

Tax Records – Return Info Other Than Taxpayer Return

- **Never used provision** – 26 USC 6103(i)(7)(A) provided for formal written request by FBI Director or his delegate to the IRS for disclosure of return information (other than taxpayer return information) to an employee personally and directly engaged in the response to or investigation of any terrorist incident, threat or activity
- **Never used provision** – 26 USC 6103(i)(7)(B) – provided for a formal written request by the head of an intelligence agency for the disclosure of return information (other than taxpayer return information) to any intelligence agency personnel who are personally and directly engaged in the collection or analysis of intelligence and counterintelligence information nor investigation concerning any terrorist incident, threat or activity
- These provisions were never used, expired December 31, 2003 and have not been renewed

Tax Records – Return Info Other Than Taxpayer Return

- Thus, in intelligence cases, we cannot get return information other than taxpayer return information, nor can we get taxpayer return information, unless case has criminal nexus
- Per 26 USC 7213A, there are misdemeanor criminal penalties that attach to unauthorized inspection or return information – thus, need to be careful when accepting any type of tax return information
- POC at IRS on disclosure matters and court orders –

Tax Records – Use in Proceedings

- Per 26 USC 6103(i)(4) entitled "Use of certain disclosed returns and return information in judicial or administrative proceeding" – taxpayer return information and return information (other than taxpayer return information) can be used in judicial or administrative proceeding pertaining to enforcement of a specific federal criminal statute or related civil forfeiture in which US or federal agency is a party – FISA application does not seem to be encompassed here
- Per 26 USC 7213, there are felony criminal penalties that attach to unauthorized disclosure of return information
- Thus, it is recommended that regardless of how you received return information, it should not be included in a FISA application

Bank Secrecy Act Records

- Financial records that can be obtained from IRS:

Can call [redacted] the IRS for this information [redacted]

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Information

- [redacted] private company [redacted]
- Has database [redacted]
- [redacted]
- POC is [redacted] Can fax a request [redacted] on FBI letterhead [redacted]
- No legal process required if information is to stay within the FBI

National Security

- Request [redacted]
- [redacted]
- Need Director/HQ designee approval
- 120 days
- Need [redacted]
- Need [redacted]
- [redacted] need [redacted]

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QUESTIONS?

- NSLB - (202) 324-[redacted]
- [redacted]
- Visit our FBI Intranet site at [redacted]

Follow-up requests to 5/17/2006 OIG Interview of FBI AGC [REDACTED]

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1. Effective dates of the two attachments to ECPA National Security Letters which list types of information that may be considered by a recipient to be "toll billing records." The attachments were marked as Exhibits 2 (shorter version) & 3 (longer version).
2. Effective dates of the two attachments to ECPA National Security Letters which list types of information that may be considered by a recipient to be an "electronic communication transactional record." The attachments were marked as Exhibits 4 (shorter version) & 5 (longer version).
3. Your emails and OGC guidance on how to handle "over collections" from any type of NSL.
- 2006
until 6/19/06 4. Your emails to "all CDCs" during the period from 1/1/2003 to date in response to questions from the field regarding NSL issues or that you initiated to address ad hoc questions.
5. Hard copies of the current model ECs and NSLs (as of March 9, 2006) and the guidance (as of March 15, 2006) posted on the FBI/OGC's Intranet. A printout from the FBI's Intranet was marked as Exhibit 6. (This request may already be in process.)
6. Documents in your hard copy or electronic files relating to the CAU/ NSL issue we discussed, including emails; letters sent by CAU to telephone carriers requesting information to be followed by an NSL; documents referencing meetings with CAU and others concerning this issue; and the forms and attachments reflecting the resolution of the discussions with CAU, including the follow-up information you referenced .
7. The name and contact information of the Federal Reserve attorney with whom you communicated on the TFOS/ NSL issue we discussed.
8. The name of the Section Chief at TFOS at the time of the TFOS / NSL issue.
9. Emails you sent, received, or were copied on regarding the TFOS/ NSL issue.
10. The FBI's current request for any legislative changes to the NSL statutes, including the suggested revisions we discussed to EPCA and the "Buckley" law.

We would be grateful if you would provide these documents to us with copies to the Inspection Division c/o Section Chief David Evans, Audit, Evaluation and Analysis Section by May 23, 2006.

ALL INFORMATION CONTAINED

HEREIN IS UNCLASSIFIED

DATE 07-12-2007 BY 65179 DHM/TAN/KSP/JE

NSL VIO-2755

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 12/08/2005

To: Counterterrorism Division **Attn:** AD, DAD

Counterintelligence Division AD, DAD

Cyber Division AD, DAD

All Field Offices ADIC
SAC
CDC

From: Office of the General Counsel
National Security Law Branch

Contact: [REDACTED]

Approved By: Caproni Valerie E
Hulon Willie T
Szady David

Drafted By: [REDACTED]

Case ID #: 319X-HQ-A1487720-OGC

Title: LEGAL ADVICE AND OPINIONS;
FBI POLICY RE REIMBURSEMENT OF COSTS TO RECIPIENTS
OF NATIONAL SECURITY LETTERS

Synopsis: Provides guidance to the field as to the establishment within the FBI of a uniform policy with respect to reimbursement of costs to recipients of National Security Letters (NSLs) for the production of information responsive to NSLs. This guidance provides that where the authorizing statute requires reimbursement, clearly we will continue our practice of paying. Where the authorizing statute does not reference any form of reimbursement, then the FBI will not pay for the information.

Details:

Four statutes that provide for the issuance of National Security Letters vary in their provision for reimbursement of costs to recipients of NSLs for production of information responsive to NSLs. The Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2709, does not provide for reimbursement of costs; thus, there is no legal obligation to pay for toll billing/subscriber records or electronic

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DATE 07-12-2007 BY 65179 DHH/TAM/KSP/JE

NSL VIO-2756

To: Counterterrorism From: Office of the General Counsel
Re: 319X-HQ-A1487720-OGC 11/22/2005

communication transactional records to which the statute applies. The Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3415, requires reimbursement of costs for information obtained from financial institutions to which NSLs are issued under Section 3414(a)(5)(A); Title 12, Code of Federal Regulations (CFR), Part 219, and appendix, provides a reimbursement of costs schedule.¹ The Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681u, requires reimbursement of costs for financial institution listings and consumer identifying information obtained from credit reporting companies but no reimbursement schedule has been promulgated.² Its counterpart, FCRA, Section 1681v, enacted as part of the 2001 USA Patriot Act, providing for full credit reports in international terrorism cases, does not authorize reimbursement of costs.

Variations in Cost Reimbursement Policy Among FBI Field Offices

The differences in the payment provisions of the NSL statutes have caused field offices to adopt varying policies as to whether they pay bills that are submitted by NSL recipients. When bills are submitted by RFPA NSL recipients, the rules are clear. Field offices must and do pay for such NSLs based on the reimbursement of costs schedule set out in the CFR. When bills are submitted by ECPA NSL recipients, where reimbursement is not required, some field offices pay the bills as submitted, others negotiate the amount of the

¹ RFPA, Section 3415 provides that "a Government entity shall pay to the financial institution assembling or providing financial records pertaining to a customer and in accordance with procedures established by this chapter a fee for reimbursement of costs as reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required or requested to be produced. The Board of Governors of the Federal Reserve System shall, by regulation, establish the rates and conditions under which such payment shall be made. Under 12 C.F.R. §219.3, Appendix A, a fee schedule has been adopted, under which photocopying is reimbursable at \$.25 per page and searching is reimbursable at \$11 per hour for clerical staff.

² FCRA, Section 1681u(e) provides that "[t]he Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section."

To: Counterterrorism From: Office of the General Counsel
Re: 319X-HQ-A1487720-OGC 11/22/2005

charge, and others flatly refuse to pay. As to credit reporting companies responding to 1681v NSLs,³ at least one such company submits bills which, to date, we have paid. With respect to credit reporting companies responding to 1681u NSLs, at least two have a policy of submitting bills, which we pay or intend to pay. While there is no fee schedule established, the fees that are or will be charged by credit reporting companies for 1681u requests are approximately ten dollars, which appears reasonable.⁴

The Problem to be Addressed by this Guidance

Having canvassed FBI field offices as to whether they would like to see the FBI adopt a uniform policy with respect to reimbursement of costs of NSL recipients, the Office of the General Counsel (OGC) has determined that field offices do in fact want a uniform policy. That is the genesis of this guidance. However, since this is an operational issue and not a legal issue, OGC has also obtained the concurrence of the FBI's Counterterrorism Division and Counterintelligence Division that a uniform policy is desirable. Thus, this guidance is intended to create a uniform policy as to reimbursement of costs of NSL recipients, the creation of which uniform policy is particularly crucial with respect to those statutes which do not provide for compensation, such as ECPA and FCRA Section 1681v.

Reimbursement of Costs Incurred by ECPA NSL recipients

The FBI hereby adopts the policy that, since it has no legal obligation to reimburse costs incurred by an NSL recipient in producing information sought by an ECPA NSL, that it will not pay bills that are submitted by ECPA NSL recipients for such information. Its position is supported by the fact that the ECPA specifically provides for certain instances in which compensation to recipients of legal process is available. Those enumerated provisions do not include Section 2709.⁵ Further, since certain NSL statutes do contain

³ The three major credit reporting companies are Experien, Transunion, and Equifax.

⁴ Transunion just recently began providing redacted credit reports in response to Section 1681u requests, and has announced its intention to charge ten dollars for those reports but has yet to do so. Experien currently charges \$9.20 per report.

⁵ Title 18, Section 2706(a) of ECPA provides for a reimbursement fee for obtaining "the contents of communications, records, or other information under

To: Counterterrorism From: Office of the General Counsel
Re: 319X-HQ-A1487720-OGC 11/22/2005

reimbursement provisions, it is clear that when Congress so intended, it did in fact enact such a provision. While there is not necessarily any obvious rationale to the determination of which NSL statutes contain reimbursement provisions, the fact is that Congress has had opportunities to remedy what may have been an oversight in the ECPA provision and has not done so.

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Further, to the extent that bills for reimbursement submitted by carriers in the past have been paid by field offices, they presumably have been done so on the theory that payment will encourage cooperation and responsiveness to an NSL request. Inasmuch as it is expected that before the end of the year, ECPA, as well as other NSL statutes, will have been amended to specifically provide the FBI with enforcement authority, there will be less of a need for the FBI to seek voluntary cooperation of carriers by providing payment to which the carriers are not legally entitled.

Enclosed is a model letter that field offices may want to use in response to requests for payment. These letters may assume particular importance when addressed to carriers who to date have received reimbursement and suddenly find themselves cut off from reimbursement under the new FBI policy.

Reimbursement of Costs Incurred by FCRA Section 1681v NSL Recipients

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section 2702, 2703, or 2704," except the provision does not apply, per section 2706(c) "with respect to records or other information maintained by a communications common carrier that relate to telephone toll records and telephone listings obtained under section 2703 of this title. The court may, however, order a payment as described in subsection (a) if the court determines the information required is unusually voluminous in nature or otherwise caused an undue burden on the provider."

To: Counterterrorism From: Office of the General Counsel
Re: 319X-HQ-A1487720-OGC 11/22/2005

Therefore, it is now FBI policy not to reimburse the costs of recipients of FCRA Section 1681v NSLs.

Reimbursement of Costs Incurred by FCRA Section 1681u NSL Recipients

While FCRA Section 1681u provides for compensation for NSLs, there has yet to be promulgated a schedule of such fees. It is FBI policy that as a general matter the fee schedule adopted for RFPA NSLs should be the basis of compensation for Section 1681u NSLs. [REDACTED]

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[REDACTED] it may prove more sensible to allow for flexibility in how [REDACTED] offices handles any such bills, with a recommendation that they coordinate with one another so that the compensation is uniform.

Conclusion

OGC recognizes that field offices are likely to need further guidance when faced with particular scenarios. There may be situations in which lack of compensation is unduly harsh in light of the burden placed on the carrier by the NSL request. Such situations may be addressed on a case-by-case basis.⁶

To the extent that there are repercussions with respect to the compliance with NSLs, we do now have in place an enforcement mechanism for NSLs via the recently enacted USA PATRIOT Act Improvement and Reimbursement Act of 2005. That statutory authority should serve to ameliorate the possible adverse consequences that might ensue at the onset of this new policy.

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Any questions about the issues set forth above should be addressed to field office Chief Division Counsel or to [REDACTED] in the National Security Law Branch.

⁶ This flexibility is conceptually analogous to the provision of ECPA, Section 2706, which authorizes court-ordered compensation when a criminal legal process seeking telephone records is especially burdensome. See footnote 5.

To: Counterterrorism From: Office of the General Counsel
Re: 319X-HQ-A1487720-OGC 11/22/2005

LEAD(s) :

Set Lead 1: (Adm)

ALL RECEIVING OFFICES

Distribute to all supervisory personnel involved
in the investigation of counterintelligence, counterterrorism,
and cyber cases.

1 - Ms. Caproni
1 - Mr. Hulon
1 - Mr. Szady

1 -
1 -

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♦♦

[redacted] (OGC) (FBI)

From: [redacted] (OGC) (FBI)
Sent: Friday, March 31, 2006 8:38 AM
To: FBI SAC's; FBI ALL CDCs
Cc: [redacted] (OGC) (FBI)

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b7C

[redacted] (OGC) (FBI)
[redacted] (OGC) (FBI)
Subject: Change in Permissible Methods of Serving NSLs

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

(1 document attached)
4/19/06

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Enclosed is an EC that has just been uploaded, 319X-HQ-A1487720-OGC, Serial 213, which permits (but obviously, does not require) NSLs to be served by non-secure fax under certain conditions. Here are the relevant conditions, as set forth in the EC:

A supervisor must approve the non-secure fax transmission. The FBI employee must call and verify that the intended person is waiting at the fax machine for the transmission. After the fax has been completed, the FBI employee must immediately call and confirm that the fax has been received. For each such non-secure fax transmission, there must be written documentation reflecting the supervisor's approval and the facts set forth above, including the time and date of the transmission, and the name of the recipient party.

The EC does NOT authorize us to receive the information back from the recipient via non-secure fax.

I hope this saves a bit of time in the NSL process.



nsifinaldeliveryservi
cepart2.w...

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SENSITIVE BUT UNCLASSIFIED

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-12-2007 BY 65179 DHM/TAM/KSR/JE

NSL-VIO-2762

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 3/20/2006

To: All Field Offices

Attn: ADIC;
SAC;
CDC;
FCI/IT Supervisors
AD Hulon;
DADs;
Section Chiefs
Acting AD Bereznay;
DADs;
Section Chiefs
AD Reigel
DADs
Section Chiefs

Counterterrorism

Counterintelligence

Cyber

From: General Counsel
National Security Law Branch, LX-1 Room 3S100
Contact: [REDACTED]

Approved By: Phalen Charles S Jr
Caproni Valerie E

Drafted By: [REDACTED]

Case ID #: 319X-HQ-A1487720-OGC

Title: LEGAL ADVICE AND OPINIONS;
SERVICE OF NATIONAL SECURITY LETTERS

Synopsis: Provides revised guidance on the service of National Security Letters (NSLs) by facsimile, as a follow-up to EC dated 6/29/2005 concerning expansion of approved methods of delivering NSLs. Specifically, the use of a non-secure fax is now an acceptable method of service of an NSL by the FBI.

Reference: 319X-HQ-A1487720-OGC, Serial 27

Details:

BACKGROUND:

The FBI issues NSLs pursuant to numerous statutes, including the Fair Credit Reporting Act, 15 U.S.C. §§ 1681u and 1681v, the Electronic Communications Privacy Act, 18 U.S.C. § 2709, and the Right to Financial Privacy Act, 12 U.S.C. § 3414. The NSLs are not classified. Nor is the information that is returned in response to an NSL (NSL return

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HEREIN IS UNCLASSIFIED
DATE 07-12-2007 BY 65179 DM/TAM/KSR/UB

NSL VIO-2763

To: All Field Offices

From: Security Division;
General Counsel

Re: 319X-HQ-A1487720-OGC

3/20/2006

information). However, the documents that are transmitted to the receiving entity and returned to the FBI do contain sensitive information. For that reason, the Office of the General Counsel (OGC) had opined in the past that NSLs should be personally served upon or secure faxed to the recipient and responsive information should be personally delivered or secure faxed to the FBI. However, by EC dated 6/29/2005,¹ the Security Division and OGC issued additional guidance which allowed for the delivery of NSLs via a controlled reputable delivery service such as Federal Express or the U.S. Postal Service's restricted delivery service, and allowed for the delivery of NSL return information by any reputable delivery service. The restrictions as to the requirement of secure fax transmissions remained in place.

At the time of issuance of that guidance, the Security Division and OGC represented that they would address the issue of the service of NSLs to the recipient and return of responsive information to the FBI by fax machines through future guidance.

While the secure faxing of NSLs and NSL return material continues to provide the most security for the information, OGC and the Security Division have continued to reexamine this issue. We recognize that the requirement of secure faxing of NSLs and NSL return information raises issues of efficiency, and sometimes potential harm to an investigation, as did the requirement of personal delivery. **Therefore, we have concluded that use of non-secure fax is permissible by the FBI in its service of an NSL upon the recipient.** (The same is not true of faxing of NSL return information. See below.)

However, there are conditions that attach to use of a non-secure fax to transmit an NSL to a recipient. A supervisor must approve the non-secure fax transmission. The FBI employee must call and verify that the intended person is waiting at the fax machine for the transmission. After the fax has been completed, the FBI employee must immediately call and confirm that the fax has been received. For each such non-secure fax transmission, there must be written documentation reflecting the supervisor's approval and the facts set forth above, including the time and date of the transmission, and the name of the recipient party.

¹ 319X-HQ-A1487720-OGC, serial 27

To: All Field Offices

From: Security Division;
General Counsel

Re: 319X-HQ-A1487720-OGC

3/20/2006

The Security Division has not approved the faxing of NSL return information via non-secure fax because of the FBI's inability to hold the recipient's employees accountable for a similarly responsible process of fax transmission at their end.

CONCLUSION

This guidance provides the outer parameters of acceptable methods or service at the present time. Obviously, headquarters and field offices may choose to continue to use secure fax and personal service, as a general policy matter or as applied to individual situations, rather than controlled delivery services and non-secure fax. As with any system designed to protect security, it is the responsibility of FBI employees, in consultation with their supervisors and the Security Division, to exercise their discretion in such a manner as to assure that the method they have chosen for service adequately protects the sensitivity of the information contained in the NSL and the return information.

Any questions regarding this communication may be directed to Assistant General Counsel [redacted] at [redacted]

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b7C
b2

To: All Field Offices

From: Security Division;
General Counsel

Re: 319X-HQ-A1487720-OGC

3/20/2006

LEAD(s):

Set Lead 1: (Adm)

ALL RECEIVING OFFICES

Distribute to all supervisory personnel involved in the investigation of international terrorism, counterintelligence, and cyber cases.

- 1 - Mr. Phalen
- 1 - Ms. Caproni
- 1 - Ms. Thomas
- 1 - Ms. Kelley
- 1 -

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b7C

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